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No. 89-1770

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

TELESTAR, INC.,
v. *Petitioner,*

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA, *et al.,*
Respondent,

MCI TELECOMMUNICATIONS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

**BRIEF IN OPPOSITION FOR RESPONDENT
MCI TELECOMMUNICATIONS CORPORATION**

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June 18, 1990

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PARENT AND SUBSIDIARIES

The parent of MCI Telecommunications Corporation is MCI Communications Corporation. The only subsidiaries of MCI Telecommunications Corporation are wholly owned subsidiaries.

THE HISTORY OF THE

REPUBLIC OF THE UNITED STATES OF AMERICA
FROM 1776 TO 1876
BY JAMES M. SMITH

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STATEMENT OF THE CASE

The proceeding below is summarized in the brief of the United States.

SUMMARY OF ARGUMENT

The decision below in the District of Columbia Circuit is not in conflict either with a decision of the Ninth Circuit or of any other court. No new question of law is presented. The decision's treatment of the assignment of evidentiary burdens is in accordance with well-established precedent. All decision makers below from the Adminis-

trative Law Judge, the FCC's Review Board, the Commission itself and the court of appeals reached the conclusion that TeleSTAR's applications should be denied, and there exists no reason to doubt their unanimous judgment.

ARGUMENT

I. There Was No "Cut-Off" of Appellate Review, No Question of Exhaustion of Administrative Remedies, and No Conflict with the Ninth Circuit

The court of appeals did not deny review of the FCC decision finding TeleSTAR unqualified, as TeleSTAR asserts. It conducted a "full review" with briefing and oral argument.¹ Although the frivolous nature of TeleSTAR's appeal did not require issuance of a published opinion,² the court explicitly found that it "had no cause to disturb the Commission's final order denying TeleSTAR's applications"—although these words are excised by TeleSTAR in the version of the court's opinion produced at page 12 of its appendix. After its review on the merits, the court sustained the FCC's conclusion that TeleSTAR had failed to carry its burden of proof.

TeleSTAR's discussion of the doctrine of exhaustion of administrative remedies is irrelevant. There is no connection, let alone inconsistency, with decisions addressing the doctrine of exhaustion of administrative remedies, such as *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675 (9th Cir. 1988), in which a district court suit was dismissed because the tribe had failed to exhaust its remedies within the Department of Interior. Here TeleSTAR was found unqualified to become a licensee by an Administrative Law Judge, by the Commission's Review Board, and by the full Commission in the course of the normal

¹ App. at 11.

² See Rule 14(c) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit.

adjudicatory process. In reviewing this unanimous agency conclusion, the court of appeals found no basis for overturning it.

II. TeleSTAR Was Repeatedly Found Unqualified

The Administrative Law Judge concluded that³:

. . . TeleSTAR engaged in substantial premature construction of fifteen Common Carrier Point-to-Point Microwave Radio Stations between Salt Lake City, Utah and Denver, Colorado. Such premature construction was carried out in wilful violation of 47 C.F.R. § 21.3(b). In engaging in such premature construction TeleSTAR's principals have lacked candor with their own shareholders, openly lied to the Bureau of Land Management, and intentionally misrepresented material facts to the Commission. Consequently they cannot be considered an honest and reliable applicant. They are not qualified to be a Commission licensee, and a grant of their applications would therefore not serve the public interest, convenience, and necessity.

The FCC's Review Board unanimously concluded that⁴:

We ourselves conclude that the overwhelming weight of demonstrative evidence . . . supports the ultimate conclusion of the instant I.D. that T/S [TeleSTAR] and its principals made serious and numerous misrepresentations to the FCC, and displayed an egregious lack of candor in this proceeding. We further conclude that the record evidence supports the ALJ's determination that T/S denials of knowledge of the need for direct FCC authority to construct its radio system are incredible. . . . We squarely agree with the primary findings of the ALJ, and with his in-

³ *TeleSTAR, Inc.*, FCC 86D-30 at ¶ 91 (Initial Decision CC Docket No. 85-202) (released April 18, 1986).

⁴ *TeleSTAR, Inc.*, 2 ¶ CC Rcd 5, 13 (¶ 24), 15 (¶ 30), and 17 (¶ 34) (Rev. Bd. 1987).

ferences as to the motives of T/S and its principals. . . . We find in T/S a gross lack of respect for candor and a flagrant disrespect for the FCC's rules and processes.

The Commission unanimously concluded that ⁵:

. . . [W]e have closely examined the record in this proceeding. Based on that record, it is clear that TeleSTAR violated the rules by its premature construction. TeleSTAR also submitted patently false information as a result of Noel Stewart's deficient certification practices. It also made misrepresentations of material facts and exhibited a lack of candor: (1) in its applications which falsely represented that TeleSTAR proposed to construct its facilities, (2) in its pleadings filed March 21 and September 20, 1985, which contained inconsistent and contradictory explanations for its premature construction, and (3) in its principals' self-serving testimony concerning their understanding and knowledge of the Commission's construction permit requirement, which was unsubstantiated and rebutted by other record evidence. The record therefore requires us to conclude that TeleSTAR is not qualified to be a licensee.

III. TeleSTAR Engaged in Unauthorized Construction

47 C.F.R. § 21.3 provides that no construction of a common carrier station "may be commenced without an authorization from the Commission." TeleSTAR certified that it was familiar with Part 21 of the FCC's Rules that includes this requirement.⁶ TeleSTAR admitted that it engaged in construction at 13 of 15 sites before filing any applications.⁷ The ALJ found that TeleSTAR had

⁵ *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2866 (¶ 49) (1988).

⁶ *TeleSTAR, Inc.*, 50 Fed. Reg. 27055, 27057 (¶ 13) (Designation Order) (1985).

⁷ *Id.* at ¶ 8. At six sites, towers, antennas, waveguides, and transmitter housings had been constructed.

"virtually completed construction at the majority of its fifteen sites."⁸ While the Commission has permitted preliminary steps such as site clearance, pouring of concrete footings for a tower, installation of a new power line and on-site storage of radio equipment and other steps not having an "intrinsic" radio communication use "related to the proposed facility," it has never condoned the wholesale construction of towers and installation of antennas without authorization of any kind, such as was undertaken by TeleSTAR.⁹

TeleSTAR makes the claim, not made below, that the "FCC had effectively relegated the FCC construction authority to a ministerial act."¹⁰ It relies for this proposition on a letter with respect to an AM broadcast station in Alaska, *King Country Broadcasters*, 55 Rad. Reg. (P&F) 2d 1591 (1984). The FCC letter in that case, however, affirmed that Congress had not intended to sanction preconstruction of broadcast facilities and there had not, contrary to TeleSTAR's assertion, been construction of a radio antenna. In the broadcast field, moreover, there is no counterpart to 47 C.F.R. § 21.3, which governs common carrier construction.¹¹

In *Eagle Telecommunications, Inc.*, 59 Rad. Reg. (P&F) 2d 1243 (1985), *recon. denied*, 59 Rad. Reg. (P&F) 2d 1249 (1986), the Commission did not condone, as Tele-

⁸ *Initial Decision*, FCC 86D-30 at ¶ 66.

⁹ *Patton Communications Corporation*, 81 FCC 2d 336, 338 (1980); *Childress Broadcasting Corp.*, 24 Rad. Reg. (P&F) 669 (1962).

¹⁰ TeleSTAR petition at 21.

¹¹ Nor is TeleSTAR's reading of *King* even correct with respect to broadcast construction. In *Christian Broadcasting of the Midlands, Inc.*, 103 FCC 2d 375 (1986), *reconsideration denied*, 2 FCC Rcd 6404 (1987), the Commission corrected any such misreading of *King* and emphasized that "Congress did not intend this agency to license an entire station which had been built prior to receiving a construction permit."

STAR suggests, the unauthorized construction by a telephone carrier of less than a mile of cable television facilities to eight homes, but rather imposed a forfeiture of \$20,000.¹² The Commission cited *Eagle* in its final decision with respect to TeleSTAR and noted that if the TeleSTAR case were “merely a case of premature construction, a lesser penalty such as a monetary forfeiture might be appropriate” but concluded that, in addition to the violations of Section 21.3, TeleSTAR was guilty of misrepresentations and lack of candor.¹³

IV. TeleSTAR's Misrepresentations Warranted Denial of Its Applications

TeleSTAR repeatedly made misrepresentations of material facts and showed a pervasive lack of candor.¹⁴ Under *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946), these actions justify its disqualification.¹⁵

¹² No authorization for radio was involved, and therefore no requirement for a construction permit, and *Eagle* defended itself by pointing out that it made no charge for service to the eight homes. *Eagle Telecommunications, Inc.*, 54 Rad. Reg. (P&F) 2d 1125, 1128 (1983).

¹³ 3 FCC Rcd at 2866 (¶ 47).

¹⁴ *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2862-2866 (1988); *TeleSTAR, Inc.*, 2 FCC Rcd 5, 6-12 (Rev. Bd. 1987).

¹⁵ See also *RKO General, Inc. v. FCC*, 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982); *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1139 (D.C. Cir. 1985); *Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 840 (1982).

V. It Was Appropriate for TeleSTAR to Bear the Burden of Proof

The agency imposed the burden of proof upon TeleSTAR¹⁶ and TeleSTAR failed to meet it.¹⁷ TeleSTAR was uniquely capable of presenting evidence with respect to any excuse that might exist for its admitted construction of substantial facilities without authorization. With respect to its misrepresentations and lack of candor, it was uniquely able to explain its own behavior. The Tele-

¹⁶ *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2862 (§ 14) (1988). In its petition, TeleSTAR claims that the agency did not impose the burden of nonpersuasion upon it with respect to the issues designated. 47 C.F.R. § 1.254, however, places upon the applicant the burden of both introduction and of proof unless the designation order provides otherwise. The Designation Order did not even mention any other party in the context of assigning burdens. Note 19 to the Designation Order, omitted in the material quoted in TeleSTAR's petition, explicitly provided that the applicant had both burdens where alleged misconduct was within its peculiar knowledge. The order cited *Granbury Communications Co.*, 68 FCC 2d 966, 969 (1978), recognizing that the applicant should bear the burden of proof "where the operative facts are peculiarly within the knowledge of the applicant," such as issues of misrepresentation and lack of candor, even if facts may initially have been brought to the agency's attention in a petition to deny filed by another party.

¹⁷ Although TeleSTAR refers, at page ii of its brief, to the burden question as the "critical" one, it is clear from TeleSTAR's conduct at the hearing, in its Findings and Reply Findings, Exceptions, and oral argument before the Review Board, that it too presumed that it had all burdens of persuasion. Only after it had failed in all other lines of argument did it drop a final footnote to its Application For Review with the Commission raising the issue. TeleSTAR failed to seek reconsideration of the Hearing Designation Order, failed to argue in its Proposed Findings and Reply Findings that it had only the burden of persuasion on the ultimate issue and failed in its Exceptions to the Initial Decision, filed with the Review Board, to argue that ALJ Miller had mis-assigned the burdens. According to 47 C.F.R. Sec. 1.277(a), which governs the filing of exceptions to initial decisions, "[a]ny objection not saved by exception filed pursuant to this section is waived."

STAR actions at issue were all recent ones involving the words and deeds of its principals.

The basic fact of unauthorized construction had already been admitted prior to the designation order and the question during hearing centered around (1) the affirmative defense by TeleSTAR that it was allegedly ignorant of the requirement for Commission authorization and that such alleged ignorance relieved it of responsibility and (2) the various misrepresentations made and lack of candor manifested by TeleSTAR. Its own state of mind, upon which it sought to premise its ignorance defense, was peculiarly within its knowledge. The Commission correctly concluded that "because the nature of these matters concerns facts within the peculiar knowledge of TeleSTAR's principals, it is not unfair or unreasonable to require TeleSTAR to present evidence concerning the activities of its principals or to carry the burden of proving that its principals were proceeding in good faith."¹⁸

McCormick observes "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue."¹⁹ This principle has been applied to hearings pursuant to 47 U.S.C. § 309(e) to require an applicant to bear the burden of proving matters within his peculiar knowledge. *Citizens*

¹⁸ *TeleSTAR, Inc.*, 3 FCC Rcd at 2862 (¶ 14).

¹⁹ *McCormick on Evidence*, Section 337 (3d ed.). Similarly, 29 Am. Jur. 2d, *Evidence*, Section 131 observes "where the evidence is entirely within the possession of one of the parties to a case, or where a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, it is his duty to produce it or to come forward with the proof." See also *Campbell v. United States*, 365 U.S. 85, 96 (1961); *United States v. New York, New Haven and Hartford Railroad Co.*, 355 U.S. 253, 256 n.5 (1957); *Selma, Rome and Dalton Railroad Company v. U.S.*, 139 U.S. 560, 568 (1891); *Greenleaf's Lessee v. Birth*, 31 U.S. (6 Pet.) 302 (1832); *Lindahl v. Office of Personnel Management*, 776 F.2d 276, 280 (Fed. Cir. 1985); *Celanese Chemical Co. Inc. v. United States*, 632 F.2d 568, 575 (5th Cir. 1980), *cert. dismissed*, 453 U.S. 950 (1981).

Committee To Save WEFM v. FCC, 506 F.2d 246, 266 (D.C. Cir. 1974)²⁰

The explicit provision in 47 U.S.C. § 309(e) that ordinarily "the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant" also reflects the more general principle that an applicant for a governmental privilege bears the burden of proving his fitness to hold the privilege.²¹ Applicants for authority from the FCC bear the burden of proof with respect to issues pertaining to their qualifications.²² TeleSTAR sought a valuable privilege from the Commission to use the radio spectrum. Under 47 U.S.C.

²⁰ In *Catoclin Broadcasting Corp. of New York*, 4 FCC Rcd 2553, 2554 (1989), the Commission imposed the burden of proof with respect to issues of misrepresentation and lack of candor on a licensee whose renewal application was challenged. In *Midwest Radio-Television, Inc.*, 18 FCC 2d 1011, 1013 (Rev. Bd. 1969), the Commission placed the burden of proof on the applicant with respect to various anticompetitive practices charged by a competitor because "much of the information sought under the designated issues is peculiarly within the knowledge of the applicant." In *United Telephone Co. of Ohio*, 26 FCC 2d 417, 421 (1970), both the burden of introduction and the burden of proof were placed on United Telephone with respect to charges of anticompetitive practices brought by a competing mobile service operator. In *West Coast Media, Inc.*, 61 FCC 2d 577, 585 (1976), both burdens were placed upon the applicant with respect to issues relating to its past programming "since information regarding KDIG's past programming is within the licensee's knowledge." In *Christina Communications*, 2 FCC Rcd 1971, 1975 (¶ 27) (Chief, Common Carrier Bureau, 1987), the burden of proof on a real party in interest issue, originally raised in a petition to deny, was placed on the applicant.

²¹ See generally *Lindahl v. Office of Personnel Management*, 776 F.2d 276, 278-279 (Fed. Cir. 1985); *Harrison v. Richardson*, 448 F.2d 638, 639 (6th Cir. 1971); *Celebrezze v. Bolas*, 316 F.2d 498, 500 (8th Cir. 1963); *Eschbach v. Contractors, Pacific Naval Air Bases*, 181 F.2d 860, 864 (7th Cir. 1950).

²² *Courier Post Publishing Co. v. FCC*, 104 F.2d 213, 215 (D.C. Cir. 1939). See also *Deep South Broadcasting Company v. FCC*, 347 F.2d 459, 464-65 (D.C. Cir. 1965).

§ 308(b), it is the responsibility of the applicant to provide the facts relevant to its "character, and financial, technical, and other qualifications." ²³

VI. The Findings That TeleSTAR Was Unqualified Were Not the Result of the Commission's Interlocutory Order After Hearing

TeleSTAR largely ignores the Commission's detailed and repeated conclusions regarding its conduct and focuses, instead, upon an interlocutory order in which the Commission gave TeleSTAR a second chance to prove the contentions it failed to prove in the hearing.²⁴ Far from expressing doubt as to the merits of the decisions below, this remand order expressed the conclusion that "[w]ithout further hearings to resolve the unanswered

²³ Undoubtedly the act contemplates that the applicant for a license shall establish those qualifications for the license which would make its grant serve the public interest, and necessarily presupposes a frank, candid, and honest disclosure of the facts as to its qualification. . . .

Great Western Broadcasting Ass'n v. FCC, 94 F.2d 244, 246 (D.C. Cir. 1937).

²⁴ While playing down the actual decisions at the agency, TeleSTAR emphasizes in its petition the opinions expressed at various times by the separated trial staff of the Common Carrier Bureau Enforcement Division that appeared in the role of a party at the hearing. The Bureau trial staff did not, however, file exceptions to ALJ Miller's Initial Decision, and in fact, filed a reply brief to TeleSTAR's exceptions *supporting* the initial decision.

The case, we thought, turned on the credibility of witnesses, and the ALJ has primary responsibility for determining whether the testimony should be credited. He found it was not credible, and we did not, and do not, believe that there is substantial evidence, sufficient to warrant overturning his decision.

Bureau Reply Brief to Exceptions, p. 2. The Bureau concluded that: "Statutorily, under Section 309(e) of the Communications Act, the applicant has the burden of proof. The ALJ found the burden had not been met, and we think that he was warranted." *Id.* at 9-10.

questions regarding TeleSTAR's premature construction, we would have no basis to reverse the conclusions of both the ALJ and the Review Board that TeleSTAR is unqualified to be a licensee."²⁵ Commissioner Dennis dissented from this interlocutory order and "would have denied TeleSTAR's applications".²⁶

The two members favoring a remand appear to have been disinclined to deny any common carrier application that was not mutually exclusive with the proposal of another applicant. They tried to give TeleSTAR every possible opportunity to make its case while recognizing that to date "TeleSTAR does not appear to have met its burden of proof."²⁷ They explained in the remand order that ²⁸:

The burden of proof was on TeleSTAR to establish its qualifications, and here that required TeleSTAR to present persuasive evidence of why it went from knowing about the FCC's preconstruction rule to thinking that the rule had changed. Yet TeleSTAR failed to present any evidence of who the sources were who supposedly led Noel and Doyle Stewart to develop erroneous interpretations of the Commission's rules. No such witnesses were called to testify. When the Stewarts testified concerning their misunderstanding of the rules, they failed to identify the sources or describe any communications which resulted in those erroneous interpretations.

If any such witnesses, in fact, existed, it would have been a simple matter to have introduced their testimony at the supplemental hearing TeleSTAR was granted for this purpose. TeleSTAR chose, however, as the Administrative Law Judge described it, to "thumb its nose at

²⁵ *TeleSTAR, Inc.*, 2 FCC Rcd 7352, 7356 (§27) (1987).

²⁶ *TeleSTAR, Inc.*, 64 Rad. Reg. (P&F) 2d 397, 402 (1987).

²⁷ *TeleSTAR, Inc.*, 2 FCC Rcd at 7353 (§ 10).

²⁸ *Id.* at 7355 (§ 21).

the Commission's remand order" and failed to present any new evidence.²⁹

VII. There Was No Disparity of Treatment with Respect to MCI

There is no basis in TeleSTAR's claim of a disparity of treatment in the Commission's decision with respect to a "petition for revocation" it filed against MCI.³⁰ TeleSTAR built nearly an entire common carrier microwave network route without applying for an authorization of any kind and its principals committed repeated misrepresentations to the Commission. MCI's violations were minor technical ones³¹ made against a well estab-

²⁹ *TeleSTAR, Inc.*, FCC 88M-1113 at 3, n.3 (released April 5, 1988).

³⁰ Under FCC rules, there is no such thing as a "petition for revocation." Third parties have no rights to have a *licensed* carrier's authorizations revoked. The discretionary power to investigate alleged violations and revoke licenses rests solely with the FCC. *MCI Telecommunications Corporation*, 3 FCC Rcd 509, 513 (§ 47) (1988), *aff'd TeleSTAR v. FCC*, 1990 WL 58394 (D.C. Cir.). Contrary to TeleSTAR's claim, Pet., p. 1, n.1, the Commission did not find "five instances of [MCI] making false statements on applications." Rather, the Commission found that MCI had inadvertently checked the wrong box on several application forms with respect to an outdated question on land ownership no longer relevant under agency regulations. The checking of the wrong box "although an incorrect statement, violates no substantive rule." *Id.* at 512 (§ 34). Also contrary to TeleSTAR's claims (Pet., p. 9), the Commission did not fine MCI for violations of prior frequency coordination procedures. Although finding a technical violation of the rules because MCI had been told that all disputes had been resolved when they had not, the Commission refused to impose any sanction, concluding that: "While MCI should have notified the Commission of the remaining unresolved dispute . . . its belief that such notification was unnecessary was not unreasonable in light of circumstances and suggests that MCI had no intent to deceive the Commission." *Id.* at 513 (§ 40).

³¹ The Commission found two actionable violations by MCI at two California microwave sites—one at which MCI had mounted

lished pattern of observance of the Commission's requirements and it was found not to have made any misrepresentations or shown any lack of candor.³²

The action with respect to TeleSTAR's application was more akin to the FCC's refusal to renew the licenses of a company that made repeated misrepresentations to the Commission, which was upheld in *FCC v. WOKO, Inc.*, 329 U.S. 223 (1946). In *WOKO*, the Court rejected an argument that deceptions of the type involved had not been uncommon and others had not been dealt with as severely, declaring, at 228, that:

The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable.

Not only are the facts in the two cases totally different, the procedural mechanisms which Congress has established for the FCC in each are different. The question of TeleSTAR's qualifications was considered under the standards of 47 U.S.C. § 309 governing applications. The issues TeleSTAR attempted to raise against MCI in its petition for revocation were, under 47 U.S.C. § 316, matters committed to the agency's discretion and did not require the institution of a show cause proceeding.

three new antennas on a previously authorized tower four days prior to receiving FCC authorization and the other at which MCI's contractor had stored two unconnected antennas on a tower built for six other antennas authorized by the agency. MCI paid a forfeiture of \$10,000 for these violations.

³² Indeed, MCI had brought one of the two violations to the Commission's attention.

VIII. Abortive Settlement Discussions Are Irrelevant

TeleSTAR digresses far from the record of the proceeding to engage in a distorted portrayal of abortive settlement discussions among parties to the case that had no effect upon the agency's disposition of the case. The first exploration of settlement was before the Review Board and addressed whether a resolution might be achieved along the lines of the settlement in *A.S.D. Answering Service, Inc.*, 1 FCC Rcd 753 (1986), *recon. granted in part on unrelated matter*, 3 FCC Rcd 4213 (1988), in which a corporation removed all of the blame-worthy principals so that no prior misconduct would be attributed to the corporation's current board. The Stewarts, who control TeleSTAR, however, refused to step down to allow the TeleSTAR applications to be addressed in a manner similar to *A.S.D.*

After both the Review Board and Administrative Law Judge had found TeleSTAR unqualified and after the Commission had sent the case back to the Administrative Law Judge to give TeleSTAR a last opportunity to prove what it had failed to prove in the original hearing, a second set of settlement discussions took place. The parties were reminded that the Commission was not bound by, nor obligated to approve, any settlement reached. MCI was willing to stand aside while the trial staff and TeleSTAR sought to convince the Commission to accept a settlement whereby TeleSTAR would acknowledge its guilt, pay a forfeiture, and take steps to avoid any recurrence. When MCI was asked by other parties whether it would affirmatively join in sponsoring a settlement proposal that might result from the discussions, however, it was not prepared to consider such participation unless a complete settlement of differences was reached whereby TeleSTAR would cease its attacks upon MCI in other forums with respect to matters arising

from the same dispute.³³ This in no way prevented other parties from urging a settlement or precluded TeleSTAR from proving its case on the merits.

These discussions were not part of the record of the proceeding below³⁴ and had no effect on its outcome. As the district court observed in dismissing the antitrust claims filed by TeleSTAR against MCI and WTCI: "The Court is not moved from its decision by TeleSTAR's allegations regarding the settlement talks because the talks occurred after TeleSTAR's petition had undergone exhaustive administrative review."³⁵

³³ In response to MCI's limited participation in the TeleSTAR proceeding (MCI was designated as a party and ordered by the Administrative Law Judge to participate after it filed a two-page informal objection to TeleSTAR's belated applications), TeleSTAR launched a revenge campaign against MCI, which included: (1) the leveling of nearly a hundred accusations of FCC rule violations against MCI, only one of which proved actionable; (2) attempts to contact the President of the United States to have him intervene in the Commission's adjudication; (3) attempts to induce members of Congress to intervene; and (4) an attempt to intimidate MCI by showing it an antitrust complaint it later filed (but which has been dismissed for failure to state a claim upon which relief can be granted).

³⁴ TeleSTAR's mis-use of offers of compromise to settle a proceeding is inappropriate. See Rule 408 of the Federal Rules of Evidence and *Texas Eastern Transmission Corp. v. FPC*, 306 F.2d 345, 358 (5th Cir. 1962), *cert. denied*, 375 U.S. 941 (1963).

³⁵ *TeleSTAR, Inc. v. MCI Communications*, U.S.D.C. D. Utah, Docket No. C 89-68 C, Transcript of hearing of May 2, 1990, p. 19.

CONCLUSION

The Court should deny the writ of certiorari.

Respectfully submitted,

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